(25)

IN THE

Supreme Court of the United States

October Term, 1942.

No. 489

AREFF SAMARA,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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CITATIONS.

CASES:

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OCTOBER TERM—1942.

AREFF SAMARA, *Plaintiff-Appellant,* vs. UNITED STATES OF AMERICA, *Defendant-Appellee.*	No. .....

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The plaintiff, Areff Samara, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on July 24th, 1942 (R. 45), affirming on different grounds the judgment of the District Court for the Southern District of New York, 39 F. Supp. 880, 1941 P-H. Par. 62,839. Petition for rehearing was filed with the Circuit Court and denied on July 24, 1942.

Summary Statement of the Matter Involved.

On June 30, 1937, plaintiff filed with the office of the Collector of Internal Revenue, Third District of New York, a claim for refund of compensating taxes paid under Section 15 of the Agricultural Adjustment Act of

1933. (The claim for refund filed herein is set forth in full in the Record at pp. 7-21).

On or about November 26, 1938 and January 28, 1939, the Commissioner of Internal Revenue sent letters to plaintiff requesting additional evidence not already contained in the claim for refund (R. 22-24). Plaintiff did not comply with this request and subsequently received a letter from the Commissioner dated March 15, 1939, rejecting his claim for refund in full (R. 25).

On March 8, 1941, plaintiff instituted suit in the United States District Court, Southern District of New York, for refund of the compensating taxes paid as aforesaid (R. 1-4). Thereafter, defendant moved to dismiss the complaint on the ground that the Court lacked jurisdiction because the claim for refund was insufficient (R. 5). The District Court granted the motion to dismiss and judgment was entered thereon dated July 16, 1941 (R. 28).

Jurisdiction.

The jurisdiction of this Court is invoked under the Act of February 13, 1925 (C. 229; 43 Stat. 938) amending the Judicial Code, Section 240; Title 28 U. S. C. A. Section 347. The judgment sought to be reviewed is that of the United States Circuit Court of Appeals for the Second Circuit entered on July 24, 1942 (R. 45), affirming on different grounds the decision of the District Court for the Southern District of New York (R. 35-37) 39 F. Supp. 880, 1941 P.-H. Par. 62,839.

Question Presented.

After rejection by the Commissioner of a claim for refund which was filed pursuant to Title VII of the Revenue Act of 1936, is claimant limited in court to the evidence presented to the Commissioner with the claim for refund or may he introduce additional evidence?

Reasons Relied Upon for the Allowance of the Writ.

I.

The Court below decided that in such suit claimant is limited to the evidence presented to the Commissioner with the claim for refund and may not introduce additional evidence. This decision is in direct conflict with the recent decision of the Court of Appeals for the Third Circuit in *Bethlehem Baking Co.* v. *United States,* 1942 P.-H. Par. 62,861 (C. C. A. 3, June 26, 1942) affirming 40 F. Supp. 936, 1941 P.-H. Par. 62,912 (D. C. Pa., 1941) and the recent decision rendered in *Bullock's Inc.* v. *United States,* 43 F. Supp. 861, 1942 P.-H. Par. 62,523 (D. C. Calif., Jan. 26, 1942), appeal dismissed by the Ninth Circuit Court of Appeals, 1942 P.-H. Par. 62,713 (May 4, 1942). It is also in direct conflict with the decisions in *B. Ney & Sons* v. *U. S. A.,* 33 F. Supp. 554, 25 A. F. T. R. 476, 1940 P.-H Par. 62,688 (D. C. for Western District of Va., May 27, 1940), *Hutzler Bros. Co.* v. *U. S.,* 33 F. Supp. 801, 25 A. F. T. R. 516, 1940 P-H Par. 62,765 (D. C. Md., July 2, 1940), No. App. (G) 1940 P-H Par. 61,058) and *London Weatherproofs Inc.* v. *U. S.,* 40 F. Supp. 977, 1941 P.-H. Par. 62,937 (D. C. for Eastern District of N. Y., September 23, 1941). Plaintiff therefore believes the holding of the Court below to be clearly wrong; that the correct rule is as decided in the five aforecited cases—in a suit on a claim for refund filed pursuant to Title VII of the Revenue Act of 1936 and rejected by the Commissioner of Internal Revenue, claimant should be permitted to introduce evidence additional to that presented to the Commissioner with the claim for refund.

II.

The rule for which we contend, is the established rule in respect to claims for refund generally under existing revenue laws.

In *Fidelity & Columbia Trust Co.* v. *Lucas, Collector of Internal Revenue,* 7 F. (2d) 146 (D. C. for Western District of Ky. July 9, 1925) 5 A. F. T. R. 5563, 1925 P.-H. Par. 12,181-A-1, the court in its opinion stated that:

> "* * * in suits to recover internal revenue taxes erroneously or illegally assessed and collected, * * * Congress has not committed the final decision in these matters to the Commissioner of Internal Revenue, or to any other executive or ministerial officer. On the contrary, jurisdiction to finally determine such matters is conferred upon the Judicial Dept., provided the taxpayer has first taken all the steps required by law to be taken before appealing to the court. * * *
>
> "In view of these statutory provisions [Section 3226 of the Revised Statutes, among others] and the authorities referred to, this court is satisfied that it has jurisdiction to try the question of the plaintiff's tax liability in this case *de novo, without in any way being limited to the evidence heard by the Commissioner,* and unprejudiced by any action he may have taken in the matter * * *."

In *Paul Jones & Co.* v. *Lucas, Collector of Internal Revenue,* 33 F. (2d) 907 (D. C. for the Western District of Kentucky, Aug. 1, 1929), 15 A. F. T. R. 681, affirmed *per curiam* in 64 F. (2d) 1016, 1018 (C. C. A. 6, Feb. 16, 1933), 12 A. F. T. R. 484, the principle established by the

Fidelity & Columbia Trust Co. case was reiterated and approved. The court, in its opinion, stated:

> "The evident purpose of Section 3226, Revised Statutes, is to afford the Commissioner of Internal Revenue an opportunity to correct any errors made in the assessment or collection of taxes before the taxpayer and the Government, or its representative, are put to the expense and trouble of litigation * * * the requirement of Section 3226, that a claim for refund must be filed before suit can be instituted, necessarily implies that the claim for refund must be sufficiently specific to enable the Commissioner to know and consider the ground or grounds upon which a refund is sought * * *. The provision contained in Article 1304 of Treasury Regulations 69, *supra,* to the effect that 'all facts relied upon in support of the claim should be clearly set forth in detail under oath' is a proper exercise of the power delegated to the Commissioner of Internal Revenue to make rules and regulations for the enforcement of the act in question * * *.
>
> *Fairly construed, the language of the regulation just quoted does not require all the evidence upon which a taxpayer relies to be presented to the Commissioner.* It simply requires the fact or reasons for the alleged illegality of the tax to be presented to the Commissioner, leaving the *taxpayer entirely free, if he fails to secure relief at the hands of the Commissioner, to adduce, in a suit in Court, new and additional evidence in support of the facts or reasons relied upon to establish the illegality of the tax.* This construction of the statute and of the regulations is not out of harmony with the rule laid down by this Court in the case of *Fidelity & Columbia Trust Co.* v. *Lucas,* 7 Fed. (2d)

146, and cited with approval by the Supreme Court of the United States, in the case of *Wickwire* v. *Reinecke*, 275 U. S. 101, 49 S. Ct. 337 * * *.

Therefore, construing Section 3226 of the Statutes in light of the rule laid down in the *Fidelity & Columbia Trust Co.* case, *supra*, I conclude that the taxpayer who brings suit after refund has been denied may rely for recovery only on the grounds presented to the Commissioner but that *in support of the grounds relied upon, he is not confined to the evidence adduced before the Commissioner, but he may offer entirely new and additional evidence* * * *."

The Paul Jones & Co. case was quoted with approval in *Biermann* v. *Shea*, 28 F. Supp. 213, 23 A. F. T. R. 575, 1939 P.-H. Par. 5.514 (D. C. N. Y., June 16, 1939), no appeal taken by the Government, 1939 P.-H. Par. 4.69.

In *Snead, Collector* v. *F. H. Elmore*, 59 F. (2d) 312 (C. C. A. 5, June 8, 1932), 11 A. F. T. R. 484, 1932 P.-H. Par. 1369, the same doctrine was approved:

"The United States have consented that illegally exacted taxes may be sued for in Court only after a claim for refund shall have been truly made to the Commissioner of Internal Revenue under regulations made by him. 26 U. S. C. A. Sec. 156; *Kings County Savings Institution* v. *Blair*, 116 U. S. 200, 206. The regulations then in force, No. 45, Art. 1036, require that 'all the facts relied upon in support of the claim shall be clearly set forth under oath'. The purpose is to enable the claimed errors to be corrected by the Commissioner and suits to be minimized, and if disagreement persists to limit the litigation to the matters which have been so re-examined and in reference to which

the tax officers are fully prepared to defend the issue. They may decline to waive and insist on a proper claim for refund as a prerequisite to suit. *Tucker* v. *Alexander, Collector, supra; U. S.* v. *Felt & Tarrant Co.*, 283 U. S. 269. *This does not mean that the claim for refund must have contained all the evidence or argument that is offered in the suit,* but it must have indicated not only the amount claimed but the substantial grounds on which illegality is asserted and the general facts supporting the grounds, so that they may be fully investigated * * *."

III.

The rule established in respect to claims for refund generally, under existing revenue laws, must have been intended to be applied in suits on rejected claims for refund under Title VII of the Revenue Act of 1936.

In *U. S.* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859, 13 A. F. T. R. 866, XIII-1 C. B. 393, 1934 P.-H. Par. 790, this Court said:

> "When Section 424 of the 1928 Act was enacted the Internal Revenue Laws contained many related provisions constituting what this Court has termed a comprehensive 'system of corrective justice' in respect of the assessment and collection of erroneous or illegal taxes. * * *
>
> *As a general rule,* where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, *new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system to be carried into effect conformably to it, excepting as a different purpose*

is plainly shown. (*U. S.* v. *Barnes,* 222 U. S. 513, 520 and cases cited; *U. S.* v. *Sweet,* 245 U. S. 563, 572; *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, 384.)

That rule is applicable here. The existing system developed through long years of experience comprehends the entire subject, including all claims for refund. Section 424 is a new enactment and relates to a designated class of such claims, concededly within the scope of the existing system. Obviously the section is intended to make some change as respects the particular class and must be given effect accordingly, but to determine what change is intended it must be examined in light of the existing system."

Title VII of the Revenue Act of 1936 is like Section 424 of the 1928 Act, which is discussed above by the U. S. Supreme Court. Similarly, Title VII was intended to fit into the existing system established in respect to claims for refund generally and was intended to be carried into effect conformably to it, excepting as a different purpose is plainly shown.

Part of the existing system established in respect to claims for refund generally is that in a suit on a rejected claim for refund the claimant may introduce new evidence in addition to that which was submitted to the Commissioner originally along with the claim for refund. This rule must have been intended to operate, as part of the existing system established in respect to claims for refund generally, in respect to claims for refund under Title VII of the Revenue Act of 1936—excepting as a different purpose is plainly shown. Apart from a substantive change (similar to the one made in Section 424 under discussion by this Court in the Jefferson case), Title VII of the Revenue Act of 1936 discloses

no purpose to depart from the existing system—in fact it was expressly intended to be carried into effect conformably to it. (The Report of the Senate Finance Committee concerning the Revenue Bill of 1936, 74th Congress, 2d Session, Calendar No. 2266, Report No. 2156, states that: "However, the procedure in the handling of these claims has been modified so as to diminish insofar as possible the administrative burden involved in passing on them. The greater number of claims which may be filed relate to claims for compensating taxes and floor stocks taxes. In these cases the issue of fact as to whether or not the claimant bore the economic burden of the tax will be relatively simple. *The bill therefore proposes that such claims shall be handled in the same manner as any other claims for refund under existing law. The claimant will merely present his claim to the Bureau of Internal Revenue, and it will be passed on without formal hearing. If the claimant is dissatisfied with the decision of the Commissioner, he will then have recourse to the district court or the Court of Claims.*") Therefore, in suits on rejected claims for refund under Title VII of the Revenue Act of 1936, evidence should be admissible in addition to that presented to the Commissioner.

IV.

In all the cases (prior to the present decision) in which this problem arose, the Courts held, in accordance with the rule established under the existing system in respect to claims for refund generally, that evidence in addition to that submitted to the Commissioner along with claims for refund should be allowed to be introduced in suits on rejected claims for refund under Title VII of the Revenue Act of 1936. *Bethlehem Baking Co. v. U. S.*, 1942 P.-H. Par. 62,861 (C. C. A. 3, June 26,

1942) affirming 40 F. Supp. 936, 1941 P.-H 62,912 (D. C. Pa. 1941); *Bullock's, Inc.* v. *U. S.*, 43 F. Supp. 861, 1942 P.-H. Par. 62,523 (D. C. Calif., January 26, 1942), appeal dismissed by the Ninth Circuit Court of Appeals, 1942 P.-H. Par. 62,713 (May 4, 1942); *B. Ney & Sons* v. *U. S.*, 33 F. Supp. 554, 24 A. F. T. R. 476, 1940 P.-H. Par. 62,688 (D. C. for Western District of Va., May 27, 1940); *Hutzler Bros Co.* v. *U. S.*, 33 F. Supp. 801, 25 A. F. T. R. 516, 1940 P.-H. Par. 62,765 (D. C. Maryland, July 2, 1940), No App. (G) 1940 P.-H. Par. 61,058; and *London Weatherproofs, Inc.* v. *U. S.*, 40 F. Supp. 977, 1941 P.-H. Par. 62,937 (D. C. for Eastern District of N. Y., September 23, 1941). The authorities would have been unanimous if not for the decision in the present case.

V.

The decision of the Circuit Court in the present case violates the pattern of procedure set forth in Title VII of the Revenue Act of 1936. Section 903 of Title VII, which provides that "All evidence relied upon" in support of a claim for refund "shall be clearly set forth under oath" and on which the Circuit Court based its conclusion that additional evidence might not be presented in the trial court, applies to all claims for refund under Title VII, to claims for refund of processing taxes as well as to claims for refund of floor stocks taxes, compensating taxes and custom processing taxes paid under the Agricultural Adjustment Act. Yet, it is made entirely clear by Section 906 (g) of Title VII that Section 903 was not intended to have the effect of precluding the claimant, on a review of the Commissioner's disallowance of his claim for a refund of processing taxes, from presenting evidence not presented to the Commissioner. Section 906 (g) makes it clear beyond

peradventure that he may do so, for it is there provided that even after the decision of the Board of Review, which is the exclusive tribunal for review of the Commissioner's action on claims for refund of processing taxes,—even after its decision and while an appeal is pending in a Circuit Court of Appeals, the Circuit Court may order a reopening of the hearing before the Board of Review in order that the claimant may present additional evidence. The only restriction upon this power is that the Court shall be satisfied that the additional evidence is "material" and that there were "reasonable grounds for failure to adduce such evidence" at the hearing before the Board. There is absolutely no qualification that such evidence must have been adduced initially before the Commissioner.*

Further observations on the Circuit Court's rationale appear to us appropriate. The Circuit Court states that "new grounds or facts in support of the claim should be submitted to the Commissioner by a timely amendment to the claim for refund". We have no quarrel with this as an abstract proposition. But we do not in this suit rely on new "grounds" or new "facts". We only bespeak

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*Section 906 (g) provides:

"* * * If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken and it shall file with the court such modified or new findings and decision. * * *"

for petitioner an opportunity to satisfy the trial court of the truth of the facts set forth in the sworn claim for refund.

The Circuit Court states that to allow the claimant to present additional evidence would defeat the administrative adjustment of claims contemplated by Title VII. That fear we submit is groundless as Section 914 of Title VII gives the Commissioner ample authority to establish the facts required to be established under that title and affords him ample power to safeguard every legitimate interest of the Government.*

Section 902 of Title VII provides that no refund shall be made unless the claimant satisfies the Commissioner *or*

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*Section 914 provides:

"In connection with the establishment of the facts required to be established under this title, the Commissioner of Internal Revenue is hereby authorized, by any officer or employee of the Treasury Department and of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda which are relevant and material in connection with any claim made pursuant to this title, to require the attendance of the claimant or of any officer or employee of the claimant, or the attendance of any other person having knowledge in the premises, and to take, or cause to be taken, his testimony with reference to any such matter, with power to administer oaths to such person or persons. It shall be lawful for the Commissioner, or any person designated by him, to summon witnesses to appear before the Commissioner, or before any person designated by him, at a time and place named in the summons, and to produce such books, papers, correspondence, memoranda, or other records as the Commissioner may deem relevant or material, and to give testimony or answer interrogatories, under oath, relating to any claim made pursuant to this title. * * *".

the trial court (or the Board of Review in cases involving processing taxes) that he bore the burden of the tax and did not shift it. If the Circuit Court's decision is allowed to stand, the opportunity given the claimant by the statute, in the alternative, to satisfy the trial court will become a mirage to thousands of claimants whose claims for refund have been disallowed by the Commissioner—and this without forewarning. As we have pointed out, all previous decisions have allowed the claimant to present additional evidence to the trial court.

Wherefore, it is respectfully submitted that the petition should be granted.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 489

AREFF SAMARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 26–27) is reported in 39 F. Supp. 880. The opinion of the circuit court of appeals (R. 32–37) is reported in 129 F. (2d) 594.

JURISDICTION

The judgment of the circuit court of appeals, following denial of petition for rehearing, was entered July 24, 1942 (R. 45). The petition for a writ of certiorari was filed October 24, 1942. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner filed a claim for refund of cotton compensating taxes paid under the Agricultural Adjustment Act of 1933. Except for his affidavit to that effect, the claim contained no evidence that the burden was not shifted. The Commissioner rejected the claim and petitioner instituted a suit for refund. The question is whether, in view of the requirements of Sections 902 and 903 of the Revenue Act of 1936, a motion to dismiss was well taken on either of two grounds:

A. That the court was without jurisdiction to entertain the action;

B. That the evidence properly before the court was insufficient to establish that petitioner bore the burden of the tax.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra,* pp. 16–23.

STATEMENT

In the period August 1, 1933, to January 6, 1936, petitioner paid cotton compensating taxes totalling $264.91, which were imposed pursuant to the Agricultural Adjustment Act of 1933, declared unconstitutional in *United States* v. *Butler,* 297 U. S. 1. Asserting his right to relief under the provisions of Title VII of the Revenue Act of 1936, petitioner filed a timely claim for refund of these taxes on the prescribed form. The instructions

accompanying the form required the claimant to set forth in the appended Schedule D the "facts and evidence, together with exhibits and other data showing the amount of the burden of the tax borne by the claimant and not shifted to other persons." (R. 11.)

Petitioner did not set forth any facts or evidence in Schedule D but left it blank (R. 9). He attached to the schedule copies of customs entries showing importation of the goods involved (R. 13, 15, 17), and Schedule F in which he "contended" that the burden of the tax was borne by him and not shifted to other persons directly or indirectly (R. 9). A statement to like effect, and substantially in the words of Section 902 of the statute, appeared also in the body of the claim (R. 7). Schedule A (R. 8) and the supplement thereto (R. 12) disclosed payment to the Collector of Customs of the amounts claimed in the suit for refund.

The refund claim, in affidavit form, was duly signed and subscribed (R. 7). Except as stated above, it contained no facts or evidence identifying petitioner as the bearer of all or any part of the tax burden.

The Commissioner notified petitioner by letter that the claim did not contain sufficient evidence to establish, as the statute required, that he bore the burden of the tax and did not shift it. The letter suggested several kinds of evidence which he might furnish, and he was given thirty days to comply.

(R. 22–23.) Approximately two months thereafter, the Commissioner notified petitioner that if the requested evidence of "non-shift" was not submitted within thirty days from the date of this second letter, the claim would be adjusted on the basis of the evidence on file (R. 24). Petitioner made no response to these letters (R. 25). Subsequently, the Commissioner rejected the claim on the ground that evidence sufficient to establish that petitioner bore the burden of the tax had not been submitted; the rejection notice stated that "Therefore * * * the Commissioner is without authority to favorably consider your claim" (R. 25).

The district court granted the Government's motion to dismiss petitioner's complaint for want of jurisdiction since the claim did not meet the "statutory requirement" of Section 903 (R. 27). The circuit court of appeals, treating the motion to dismiss as one for summary judgment, held that grounds and facts on which the Commissioner had no opportunity to pass could not be adduced upon trial, and that the evidence properly before the court failed to spell out a case for relief (R. 32–37). The case was remanded for dismissal on the merits (R. 45).

ARGUMENT

Whether based on lack of jurisdiction to entertain the suit or on insufficiency of admissible evidence to prove the case, dismissal of petitioner's

refund action was correct. Since settled authority is in accord, further review by this Court is unnecessary.

Congress expressly limited refunds of amounts collected under the Agricultural Adjustment Act to taxpayers who establish that they bore the burden of such amounts, have not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly. Section 902 of the Revenue Act of 1936 (Appendix, *infra*).

By further provision, refund is to be disallowed unless the taxpayer has filed a claim in accordance with regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury, and all evidence relied upon in support of such claim is required to be clearly set forth under oath. Section 903 of the Revenue Act of 1936 (Appendix, *infra*). If the Commissioner fails to act on the claim or rejects it, the claimant can resort to the courts or to the Board of Review which the Act created. Sections 904 and 905 of the Revenue Act of 1936. See also Section 906.

1. To invoke the jurisdiction of the district court, petitioner was required to show not only that he filed a timely claim which was rejected, but that the claim which he filed answered the requirements of the statute. Conditions to suit against the sovereign must be strictly met. *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269; *Dascomb* v. *McCuen*, 73 F. (2d) 417 (C. C. A. 2d), certiorari denied *sub*

nom. Chandler v. *McCuen,* 295 U. S. 737; *Biermann* v. *Shea,* 28 F. Supp. 213 (S. D. N. Y.). Compliance in the case at bar was *de minimis,* if there was any compliance at all.

"All evidence relied upon" (sec. 903) in support of this claim, as set forth on the prescribed form, consisted merely of a broad general assertion by the claimant that the tax had not been shifted. A self-serving declaration in such terms is not evidence; it is at best an ultimate fact, if not a conclusion of law. See *Lee Wilson & Co.* v. *Commissioner,* 111 F. (2d) 313, 123 F. (2d) 232 (C. C. A. 8th); *Landrum* v. *Commissioner,* 122 F. (2d) 857 (C. C. A. 8th); *Tennessee Consolidated C. Co.* v. *Commissioner,* 117 F. (2d) 452 (C. C. A. 6th); *Morristown Knitting Mills, Inc.* v. *United States,* 42 F. Supp. 817 (C. Cls.). And it gains nothing by being made under oath.[1]

[1] It clearly appears from the legislative history of Sections 902 and 903 that Congress intended that these claims should be substantiated by detailed facts, records, and schedules rather than unsupported affidavits. Where, as in Section 602 (b) of the same Act, Congress intended to permit the Commissioner to base his action on claims substantiated by affidavits rather than detailed schedules and records, a specific amendment was enacted for that purpose. Eighty Cong. Record, 8660. See also Senate Finance Committee Report, S. Rep. No. 2156, 74th Cong., 2d sess., p. 29 (1939–1 Cum. Bull. (Part 2) 678). However, with respect to the changes made in Section 21 (d) of the Agricultural Adjustment Act, as amended by Section 903 of the Revenue Act of 1936, the Senate Finance Committee said (p. 34):

"* * * While a great many claims for refund have been

The customs entries were attached, and evidence [2] that the claimant had paid the tax was also included in the claim (see Statement, *supra*, p. 3). But since the statute limits reimbursement to the person who ultimately bore the tax,[3] there is scant probative value in evidence of initial payment.

Petitioner was required under the terms of the statute (secs. 902–903) to set forth affirmatively the evidence of "non-shift" on which he relied. And if, as the district court found (R. 27), the claim contained no evidence to substantiate the assertion

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filed under section 21 (d), the great majority of such claims do not set forth the *evidence* relied upon in support of such claims. * * * It is, therefore, necessary that new claims be filed so that each claimant's right to secure a refund may be established in accordance with the procedure set forth under Title VII * * *." [Italics supplied.]

[2] The circuit court of appeals regarded this and the claimant's affidavit as some supporting evidence, sufficient at least to confer jurisdiction on the district court after the Commissioner's rejection of the claim (R. 35).

[3] At the time of the original enactment of the Agricultural Adjustment Act under which this tax was collected, Congress assumed that the economic burden of the taxes would be shifted to the consumer in domestic markets. See H. Rep. No. 6, 73rd Cong., 1st sess., pp. 6–7, Protection of Consumers; H. Rep. No. 1241, 74th Cong., 1st sess., pp. 2–3, 20, Declaration of Policy—Consumer's Interest; 79 Cong. Rec. 9560. The subsequent history of the Agricultural Adjustment Act demonstrates that the assumption was well founded. See An Analysis of the Effect of the Processing Taxes Levied under the Agricultural Adjustment Act, U. S. Treasury Department (1937). It was in the light of this situation that Congress enacted the refund provisions of Title VII of the Revenue Act of 1936. See *Cudahy Packing Co.* v. *Harrison*, 18 F. Supp. 250 (N. D. Ill.).

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that he bore the burden, petitioner could have no standing in court.[4] *Lee Wilson & Co.* v. *Commissioner,* 111 F. (2d) 313, 123 F. (2d) 232 (C. C. A. 8th); *Landrum* v. *Commissioner,* 122 F. (2d) 857 (C. C. A. 8th); *Tennessee Consolidated C. Co.* v. *Commissioner,* 117 F. (2d) 452 (C. C. A. 6th); *Solomon* v. *United States,* 57 F. (2d) 150 (C. C. A. 2d); *Morristown Knitting Mills, Inc.* v. *United States,* 42 F. Supp. 817 (C. Cls.).

Moreover, the regulations (Art. 202, Appendix, *infra*) prescribed under congressional authority (sec. 903, Appendix, *infra*) required substantiation of all the facts necessary to establish the claim to the satisfaction of the Commissioner.[5] Yet prior to trial, petitioner furnished no evidence that he bore the tax burden beyond that, if any, which the claim itself contained, although he had been twice

[4] If the fact of exaction of the illegal tax and petitioner's unsubstantiated assertion that he did not shift the burden were all the evidence "relied on" (sec. 903) by him in support of the claim, certainly the "reliance" was totally unwarranted. It is not contended that all available evidence must be presented to the Commissioner before the taxpayer can come into court. But surely in its elaborate provision for action by the Commissioner on refund claims, Congress did not intend him to be by-passed simply by the taxpayer's pre-trial "reliance" on evidence showing nothing which would warrant relief. The words of the statute (sec. 903) are "*All* evidence relied upon *in support of such claim* shall be clearly set forth under oath." [Italics supplied.]

[5] Of course, "to the satisfaction of the Commissioner" (sec. 902) is a phrase of admonition and means only that "non-shift" will not lightly be inferred. See *United States* v. *Jefferson Electric Co.*, 291 U. S. 386.

notified by the Commissioner that the claim did not suffice. Observation of the regulations was likewise a jurisdictional requirement, even though it could be waived. See *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258; *Tucker* v. *Alexander*, 275 U. S. 228; *Biermann* v. *Shea*, 28 F. Supp. 213 (S. D. N. Y.).

The Commissioner was entitled, however, to insist that the defects in the claim be cured (*Lee Wilson & Co.* v. *Commissioner*, 111 F. (2d) 313, 123 F. (2d) 232 (C. C. A. 8th)); and if his conduct was consistent with insistence that the regulations be observed,[6] the taxpayer could not come into court

[6] The Commissioner gave notice (R. 24) that if the requested evidence was not submitted, he would "proceed with the adjustment of the claim on the basis of the evidence on file." If no supporting evidence was contained in the claim, as the district court found (R. 27), or otherwise furnished to the Commissioner, as is undisputed, this notice would seem to be a declaration that, unless amended or supplemented, the claim would be rejected as defective because unsubstantiated by facts.

Further, petitioner was informed in the rejection letter (R. 25) that because of his noncompliance with Section 903 and Regulations 96, the Commissioner was "without authority" to consider the claim favorably. No amendment to the claim was filed.

It is to be noted, too, that there was no evidence of a conference between the Commissioner and petitioner (cf. *Bethlehem Baking Co.* v. *United States*, 40 F. Supp. 936 (E. D. Pa.)); the Commissioner had held no hearings on the facts or the law (cf. *Cudahy Packing Co.* v. *Harrison*, 18 F. Supp. 250 (N. D. Ill.)); and the Government did not answer plaintiff's complaint upon the merits (cf.

without having complied. *Bullock's, Inc.* v. *United States,* 43 F. Supp. 861 (S. D. Cal.). See also *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62; *Biermann* v. *Shea,* 28 F. Supp. 213 (S. D. N. Y.). Implicit in the decision of the district court was its view that there was no waiver [7] (see R. 27).

2. If we assume, however, that the claim sufficed to give the district court jurisdiction of the action, petitioner still had to prove his case. He could not do so unless the evidence essential to recovery was admissible at the trial although he had not previously furnished the Commissioner with any facts which would substantiate his claim.

The manifest purpose of statutory provisions of this character is to ensure administrative adjustment of claims wherever possible. This purpose would be completely defeated if a taxpayer could advance one ground for relief to the Commissioner and another to the court. It is well settled that he cannot do so. *United States* v. *Felt & Tarrant Co.,* 283 U. S. 269; *United States* v. *Piedmont Mfg. Co.,* 89 F. (2d) 296 (C. C. A. 4th); *Weagant* v. *Bowers,* 57 F. (2d) 679 (C. C. A. 2d). And "grounds" and

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Bethlehem Baking Co. v. *United States,* 129 F. (2d) 490 (C. C. A. 3d)) but moved for its dismissal for lack of jurisdiction (see R. 5, 26).

[7] The court below was of the opinion that the Commissioner had not insisted on compliance with the regulations, but had considered and rejected the claim on its merits, thereby waiving any irregularity in form (R. 35). *Bethlehem Baking Co.* v. *United States, supra; Cudahy Packing Co.* v. *Harrison,* 18 F. Supp. 250 (N. D. Ill.).

"facts" are one and the same where, as here, the claimant's rights rest entirely on complex factual questions.[8] The same principle of law is therefore applicable. See *Dascomb* v. *McCuen,* 73 F. (2d) 417 (C. C. A. 2d), certiorari denied *sub nom. Chandler* v. *McCuen,* 295 U. S. 737; *Snead* v. *Elmore,* 59 F. (2d) 312 (C. C. A. 5th).

The court below did not hold, as petitioner assumes throughout his brief, that no evidence which has not been submitted to the Commissioner may be introduced at the trial. The claimant may corroborate, elaborate, and supplement; this the court made clear (R. 37). But he may not present facts at the trial which materially differ from those he disclosed to the Commissioner, nor may he entirely circumvent the intended administrative procedure by filing a purely formal claim without any disclosure.[9] As the court below said (R. 37), "There

[8] See Section 907, Appendix, *infra*, establishing a method for determining the extent of shift by comparison of "average margin" during the tax period with "average margin" for the period before and after the tax period, "average margin" being calculated from the individual taxpayer's sales, tax, and cost data.

[9] Petitioner cites (Pet. 12) Section 914 which empowers the Commissioner to examine records, subpoena witnesses, take depositions, etc., as the means Congress established for the Commissioner to secure any information he may need to pass upon the merits of the claim. Obviously this section is merely to aid the Commissioner's investigation of the substantiation which the taxpayer is required to supply.

Petitioner also calls attention to Section 906 (g) (Pet. 11–12) allowing additional evidence to be adduced under certain conditions even after a circuit court of appeals has assumed jurisdiction to review a decision of the statutory

is certainly no hardship in applying such rule in the case at bar, for the plaintiff was repeatedly warned by the Commissioner's letters."

There is no conflict among the circuits that this is the law. Indeed, the authorities uniformly recognize the principle which the court below applied. See cases cited, *supra,* pp. 10–11. The cases taxpayer cites (Pet. 3, 9–10) as holding to the contrary do not present situations where the claim contained no substantiating evidence and none was furnished prior to trial.

Thus in *Bethlehem Baking Co.* v. *United States,* 129 F. (2d) 490 (C. C. A. 3d), the taxpayer and Commissioner held an informal conference at which the entire case was reviewed. The taxpayer had previously submitted an analysis of its costs. The Third Circuit expressly recognized a duty in the claimant to endeavor by sufficient proof to satisfy the Commissioner of the merits of the claim.

In *Bullock's, Inc.* v. *United States,* 43 F. Supp. 861 (S. D. Cal.), the court distinguished the case

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Board of Review. However, the conditions are that the applicant for leave to furnish such evidence must show to the satisfaction of the court not only that such additional evidence is material, but that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer of the Board of Review. If this provision furnishes a basis for argument that the trial court may hear additional evidence upon which the Commissioner has had no opportunity to pass, it would seem that a similar showing of reasonable grounds for failure to submit it to him should at least be made. See *Ney* v. *United States,* 33 F. Supp. 554 (W. D. Va.).

before it from this very case in these words (p. 862):

> In the Samara case, Judge Knox [Coxe] of the Southern District of New York, found that the claim as presented * * * failed *utterly* to comply with the statute. * * * "it [the claim] merely contained a broad, general assertion * * * *without evidence of any kind* to substantiate the assertion. * * *" [Italics supplied.]

And quoted with approval in the *Bullock's* case was this language from the opinion in *Hutzler Bros. Co.* v. *United States,* 33 F. Supp. 801 (Md.), a decision which petitioner also urges is in conflict (p. 803):

> * * * it is not intended that a claimant *who produces before the Commissioner certain evidence* is forever thereafter barred from introducing *further* evidence in resorting to a court proceeding for refund, * * *. [Italics supplied.]

Ney v. *United States,* 33 F. Supp. 554 (W. D. Va.), is another case in which it appeared that the claimant made a pre-trial disclosure of all the facts on which he relied. He submitted to the Commissioner affidavits of various persons connected with the business, each of which contained statements negativing any increase in sales price during the tax period; and at the trial he merely offered the affiants as witnesses to amplify their statements previously made. The court specifically noted that

there was no disinclination on the part of the taxpayer to furnish all the evidence he could.

It is not possible to determine from the opinion in *London Weatherproofs, Inc.* v. *United States,* 40 F. Supp. 977 (E. D. N. Y.), what evidence, if any, the claim there contained. But since the court in that case relied on the *Hutzler* and *Ney* decisions, in both of which the claimant had supplied substantiation, the case cannot be an authority contrary to the position of the court below.

Neither is *Fidelity & Columbia Trust Co.* v. *Lucas,* 7 F. (2d) 146 (W. D. Ky.), cited by petitioner (Pet. 4), a conflicting decision. In that case the Collector was urging that the court was powerless to give the taxpayer relief unless it should find that in assessing the tax, the Commissioner acted fraudulently or arbitrarily in passing on the facts or was clearly mistaken as to the law; and that the court, in so determining, could look only to the evidence which was before the Commissioner at the time he passed on the refund application.

Finally, the excerpt quoted (Pet. 6–7) from *Snead* v. *Elmore,* 59 F. (2d) 312 (C. C. A. 5th), not only fails to support petitioner's contention of error here but effectively shows that there was none.[10]

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[10] The excerpt reads in part (p. 314):

"* * * The purpose [of the requirement that all the facts relied upon in support of the claim must be clearly set forth under oath] is to enable the claimed errors to be corrected by the Commissioner and suits to be minimized, *and*

CONCLUSION

The decision below is sound, whether rested on jurisdictional or substantive grounds. There is no conflict of decisions. Accordingly, the petition for certiorari should be denied.

Respectfully submitted.

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if disagreement persists to limit the litigation to the matters which have been so re-examined and in reference to which the tax officers are fully prepared to defend the issue. * * * This does not mean that the claim for refund must have contained all the evidence or argument that is offered in the suit, but it must have indicated * * * *the substantial grounds on which illegality is asserted and the general facts supporting the grounds, so that they may be fully investigated.* * * *" [Italics supplied.]

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such

amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C. 644)

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (7 U. S. C. 645.)

* * * * *

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evi-

dence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed

during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

* * * * *

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

* * * * *

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his

records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production.

If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the

processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others. (7 U. S. C. 649.)

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SEC. 916. RULES AND REGULATIONS.

The Commissioner shall, with the approval of the Secretary, prescribe such rules and regulations as may be deemed necessary to carry out the provisions of this title. (U. S. C. 658.)

* * * * *

Treasury Regulations 96 (promulgated under the Revenue Act of 1936):

ART. 201. *Claims—Form and where to file.*—Claims for the refund of tax shall be made on the prescribed forms. Such claims shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations. Each claim (except claims for refund of compensating tax—see article

401) shall be filed with the collector of internal revenue for the district wherein the claimant has his principal place of business. If the claimant has no principal place of business in the United States, the claim shall be filed with the collector of internal revenue located at Baltimore, Md. Copies of the prescribed forms may be obtained from any collector of internal revenue.

ART. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

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